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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 200

TRAYTON L. LATHROP,
Appellant,

vs.

JOSEPH D. DONOHUE,
Appellee

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF ON BEHALF OF STATE BAR OF MICHIGAN, AMICUS CURIAE

ALBERT E. BLASHFIELD and
J. CAMERON HALL, Counsel,
1323 Dime Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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STATEMENT OF POSITION

This brief is respectfully submitted on behalf of the State Bar of Michigan, *amicus curiae*. The State Bar of Michigan will have existed as an integrated organization of the Michigan bar for 25 years on January 1, 1961.

It is our purpose to confine this brief to a discussion of the more important fundamental principles and juridical concepts here involved.

It is our claim that the decision and judgment of the Supreme Court of Wisconsin (R. 65-81) is sound and should be affirmed. We see therein no abridgment of appellant's freedom of speech or association. Nor do we perceive that appellant has been deprived of his liberty or property without due process of law, or that he has been denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

The "rule of reason" applies to all aspects of this case.

RESTATEMENT OF THE QUESTION INVOLVED

Appellant's statement of the question involved beclouds the real issue. The true question, we submit, is whether the dictates of reason, and therefore the Fourteenth Amendment, are offended where the Supreme Court of Wisconsin established by law as a state agency, a self-governing and self-regulating organization of the entire bar of that state, and required payment of a small annual fee by each member of such bar to defray the expenses thereof, for the purposes of aiding the courts "in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the

science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged" (R. 8).

ARGUMENT

1. The legal profession is an indispensable component of our system for dispensing justice under law, and as such has certain public responsibilities.

Attorneys are licensed because of their learning and ability, so that they may not only properly protect the rights and interests of their clients, but be able properly to assist the court in disposing of litigation and otherwise in the performance of its judicial function. They are required to meet higher than ordinary standards of moral character so that as "agents and officers of the court, which they are, they may not bring discredit upon the due administration of the law." *Cobb v. Judge of Superior Court* (1880) 43 Mich. 289.

Indeed, these requirements are essential so that our system for establishing and dispensing justice can be developed to a high point of efficiency and so maintained that the public, upon whose approval it depends, shall have absolute confidence in the integrity, effectiveness and impartiality of its administration. *Preamble, Canons of Professional Ethics of the American Bar Association.*

Self-adulation or not, it is pertinent again to remind ourselves, as did Frankfurter, J. in *Schware v. Board of Law Examiners,* 353 U. S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752, 64 A. L. R. 2d 288, "that all of the interests of man that are comprised under the constitutional guaranties

given to 'life, liberty and property' are in the professional keeping of lawyers." They are in the professional keeping of no other group of individuals to such an extent.

The growth of populations and the changes that are taking place in social and economic philosophies continually spawn new concepts in jurisprudence that threaten constantly to erode the framework of democratic institutions. To cope with these problems, and to provide proper solutions, requires concentration of the manpower of the entire legal profession, with all of the resources of wisdom, discretion, statesmanship and finance that it can muster.

The legal profession, and each member thereof, also have the responsibility for self-regulation as to ~~this~~ their conduct and professional affairs.

It is no exaggeration to say that these are, indeed, "anxious responsibilities." They are responsibilities common to all who are licensed to practice law. They command vigilance, not indifference; action, not silence.

Appellant assumed the sum total of these responsibilities when he took and subscribed to the oath of his office upon his admission to the bar. Presumably he did so by his own volition, without any compulsion or coercion. By so doing, he became associated with the judicial department of his state as a member of the bar. He became an instrument of the judicial process. Indeed, he became an integral and essential part thereof. Is this court disposed in this case to hold that the Fourteenth Amendment gives him the right to shirk an iota of his responsibilities? If so, which may he shirk, and which may he not?

2. Regulation of a state bar through a self-governing and self-financed agency of the state is reasonable.

The juridical device of integration is predicated upon the *de facto* existence of the bar of a state as a defined body of persons with common privileges and responsibilities who are not wholly united. The device, when employed to integrate the bar of a state, implements the conception that all persons who are licensed to practice law in that state are members of the bar of that state by virtue of such license. It is the unification of all of the members of the bar into an integral whole.

At the time this device was employed in Wisconsin, the voluntary Wisconsin Bar Association consisted of a segment of only 68% of the members of the bar of that state (R. 2). It is of no significance bearing upon constitutionality that the structure and purposes of the Wisconsin Bar Association were substantially preserved in the State Bar of Wisconsin. Nor is it of any constitutional significance that the State Bar of Wisconsin is called an "association".

Since the bar as a whole could not function properly as a practical matter without corporate-like capacity to transact its business and carry on its affairs, integration of necessity breathes a semblance of corporate life into the body of the state bar, and equips it with the traditionally American forms and methods of self-government through elected representatives.

Because of the interest of the public in the conduct and activities of the organized bar, and its members, integration is the governmental sanction of the existence of the state bar as a *de jure* public body, and not as a private association, or corporation. The usual constitutional prohibition against the creation of corporations, or associations, by special act, is no impediment. It is generally held

that such prohibition does not apply to the creation or sanction of public or quasi-public bodies,—corporate or otherwise. *Huron-Clinton Metropolitan Authority v. Boards of Supervisors of Five Counties* (1942) 300 Mich. 1.

The governmental act by which integration of the bar occurs may be that of the state legislature, or the state supreme court, or both. If performed by the legislature, it is the exercise of police power vested in the legislature by the constitution to regulate occupations that are affected with a public interest. If performed by the supreme court, it is an exercise of inherent judicial power to supervise the operation of the judicial process, including regulation of the practice of law, and the professional activities and qualifications of those who are privileged to do so; and, by necessary inference, the conduct and activities of the bar as a whole. The judicial sanction is effectual especially where, but not necessarily because, the legislature may have acted to "create" the entity. Nor does the fact that the legislature may, or may not, have acted detract from the right of the court to do so in any event. *Ayers v. Hadaway,* (1942) 303 Mich. 589, 6 N. W. 2d 905.

The power to create, or sanction, corporate-like entities is one of the attributes of sovereignty, which under our form of government is vested in the people, and is exercised by three independent departments of government. Usually, corporate bodies, both public and private, involve political or property rights, or both. For this reason it is generally held that the power to create both public and private corporations is vested exclusively in the legislative branch, as the representatives of the people. Likewise, the creation of administrative agencies with defined corporate capacities and powers, and the imposition of a license fee

for regulation under the police power, are generally legislative functions.

However, the license to practice law, as such, involves no constitutionally guaranteed substantive political or property rights. *Re Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 S. Ct. 1082. It is a privilege granted by the state through its judicial department. Both the issuance and revocation of such license are exclusively judicial functions. Neither has ever been held to be a legislative function. Procedurally, of course, a license to practice law cannot be denied to a qualified person upon grounds that offend the "dictates of reason."

The law is established that the Courts of the several States and the Supreme Court of the United States each are autonomous in determining the privileges, duties and discipline pertaining to the practice of law in each of their respective spheres. As stated by Frankfurther, J. in *Thread v. United States of America*, 354 U. S. 278, 1 L. Ed. 2d, at page 1344:

> "While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court."

The inherent power of the judiciary to license for the practice of law includes by necessary implication the right to regulate all phases of that activity, and to require payment of a reasonable annual fee by the licensee for such purpose. Also, by necessary inference, and parallel with

the legislative function in other cases, the state supreme court possesses sufficient sovereign power to establish an administrative agency under its own jurisdiction and control to aid the court in the administration of justice and to regulate the practice of law; and to equip such agency with the powers and capacities necessary for its efficient and effective operation, without encroaching upon the legislative function.

The Supreme Court of Wisconsin, of course, could not directly supervise the professional affairs of 4,700 members of the bar of that state. Therefore, integration of the bar in that state was merely the recognition by the Supreme Court of Wisconsin that the bar as a whole, when provided with the forms and methods for self-government in relation to the professional affairs and responsibilities of its members, and with corporate-like capacity to transact its business, is the agency best suited to aid effectively in regulating the practice of law, and to perform the other functions that the legal profession as a whole and each member thereof has the responsibility to perform. It was a recognition by that state that the members of the bar, by reason of their superior education and training in the law, are capable of self-regulation under the general supervision of the state supreme court. An association-like entity provides a suitable framework for such an agency.

Is such governmental action unreasonable? If there be any who believes it is, allow us to suggest a familiar alternative that has been held many times not to be.

A state by legislation, certainly could establish a state bar commission, or commissioner, as a state administrative agency for the purpose of regulating the practice of law, including minimum qualifications for admission and grounds for disbarment, and could require each member of the bar to pay an annual license fee for the purposes of

such regulation. Practically all of the states have dealt similarly with doctors, dentists, real estate brokers, architects, engineers, plumbers and barbers, to mention but a few. Much closer, and perhaps more efficient, regulation might be possible through this type of state agency.

Regulation of the practice of law by this means could well include a *requirement* for continued education, in addition to the examination of applicants for admission, and the usual provisions for discipline. Included, also, could well be regulation of the fees and services of lawyers.

It is not uncommon for such state agencies periodically to publish material germane to their respective fields of activity, and to be authorized to appoint advisory committees to recommend matters within their phere of activity for legislative action. Many, also, devote part of the funds at their disposal to public relations activity. The licensees under this type of state agency would be integrated in fact, and in law.

Absent, however, would be the forms and methods of self-government and self-regulation by the licensees that are common to the integrated organizations of the bar, including the one in Wisconsin. Is this court disposed to hold that the dictates of reason, and therefore the Fourteenth Amendment, are offended by the inclusion of these elements in the self-financed, state-created instrumentality for the regulation of the bar? To so hold, we submit, would be to deny that the members of the bar, notwithstanding their superior and specialized education and training in the law, are competent to be entrusted with the responsibilities for self-government and self-regulation.

3. The integrated state bar should be distinguished from the labor union.

It may be of interest to observe that the integrated organization of the bar of a state bears a striking resemblance to the self-financed pre-Nineteenth Century craft guilds. These guilds appear to have been charged not merely with the self-governance of the craftsmen, but with the interest of the craftsmen and the public at large in the craft and its products. Contrary to popular notion, they were not even then the fore-runner of today's workers' or employers' unions whose essential functions have been competitive *ab initio*, moving to monopoly *ante finem*. The craft guilds, in contrast with the modern labor union, were in no way motivated by the collective bargaining concept. They were instead instruments for determining the standards of life, quality and price in a particular field of activity, these standards being enforced, if need be, by the state authority. Stone, *The Province and Function of Law*, page 607, *et seq.*

The craft guild was one of two classes of peace guilds, the other being the neighborhood groups. "Both of these, in time, developed into an approximation of the modern municipal corporation, each exercising minute supervision over those within its jurisdiction, the one dealing with all persons living within a certain territory, and the other with all persons of like occupation residing within a certain territory." *Fletcher, Cyclopedia Corporations*, Vol. 1, p. 5.

The modern labor union, on the other hand, is and always has been a private association of workers. The "closed shop" feature of the typical union contract is strictly a matter of private agreement between the workers and their employer negotiated through the device of collective bargaining by the labor union as the authorized

representative of the workers. By contrast, the integrated state bar negotiates no employment contract with anyone on behalf of its members. It is not an organization primarily motivated by private economic considerations. The integrated state bar exists for the public purposes for which the State Bar of Wisconsin, and the 26 others, were organized.'

The constitutionality of the privately-negotiated "closed shop" agreement, with the consequent exclusion from employment of non-union members, was established in *Railway Employees Dept. A. F. L. v. Hanson* (1956) 351 U. S. 225, 100 L. ed. 1112, 76 S. Ct. 714.

Certainly there can be no valid challenge to the constitutionality of a state requirement, not involving a private contract, that those charged with public responsibilities as members of the bar be excluded from reaping personal benefits from the practice of law if they are unwilling at the very least to pay the small annual license fee imposed for the purpose of enabling the bar as a whole to carry out such public responsibilities.

CONCLUSION

The decision and judgment of the Supreme Court of Wisconsin was neither arbitrary nor capricious, nor hastily formulated. The necessity of establishing the State Bar of Wisconsin as a self-governing, self-financed regulatory agency of that state was under consideration by that court at various times over a period of 15 years, not including its review in this case of what it had done. Such deliberate action did not offend the dictates of reason, and therefore did not violate the Fourteenth Amendment. The decision and judgment of the Supreme Court of Wisconsin in this case should be affirmed.

Respectfully submitted,

ALBERT E. BLASHFIELD and
J. CAMERON HALL,
Counsel for the State Bar of Michigan, Amicus Curiae,
1323 Dime Building,
Detroit 26, Michigan.